

**Before the
Federal Communications Commission
Washington D.C. 20554**

In the Matter of)	
)	
BellSouth Emergency Petition for)	WC Docket No. 04-245
Declaratory Rule and Preemption of)	
State Action)	

OPPOSITION OF ITC^DELTACOM COMMUNICATIONS, INC.

I. INTRODUCTION

ITC^DeltaCom Communications, Inc. ("ITC^DeltaCom") submits these comments in opposition to BellSouth's Emergency Petition for Declaratory Ruling and Preemption of State Action.¹ BellSouth Telecommunications, Inc. ("BellSouth") approached ITC^DeltaCom to negotiate a new interconnection agreement between the parties. From the initial interconnection agreement negotiation proposal and continuing through the arbitration proceeding at the Tennessee Regulatory Authority ("TRA") (and in other states in the BellSouth region), BellSouth repeatedly and persistently proposed that a rate be included in the interconnection agreement for local circuit switching made available in the Top 50 MSAs under section 271 of the Communications Act, as amended (the "Act"). In other words, contrary to BellSouth's argument, it voluntarily agreed to negotiate a section 271 local circuit switching rate and insisted that such rate be included in the parties' interconnection agreement. Accordingly, under *Coserv Limited Liability Corporation v. Southwestern Bell Telephone Company*,² the rate to be charged for switching provided pursuant to section 271 of the Act was an "open issue" that was appropriate for resolution by the TRA.

The TRA, acting as an arbitrator, properly rendered a decision on this unresolved issue between ITC^DeltaCom and BellSouth. The TRA has all necessary authority to render the decision pursuant to

¹ See *Pleading Cycle Established for Comments on BellSouth's Emergency Petition for Declaratory Ruling and Preemption of State Action*, Public Notice, WC Docket No. 04-245 (July 6, 2004).

² 350 F. 3d 482 (5th Cir. 2003).

the Act and applicable case law, which requires that a decision be rendered for all unresolved issues brought in an arbitration case.³ ITC^DeltaCom respectfully requests that the Commission deny BellSouth's petition for preemption.

II. STATEMENT OF FACTS

BellSouth has provided an incomplete statement of facts, omitting relevant information that unquestionably demonstrates that BellSouth voluntarily negotiated the so-called "market" rate for local circuit switching and submitted to the jurisdiction of the TRA. Indeed, as early as the opening request for negotiation – and throughout the course of the negotiations, and continuing through the arbitration – BellSouth proposed a rate for local circuit switching and requested that the TRA establish a rate for such switching provided under section 271 of the Act.

On April 12, 2002, BellSouth requested renegotiation of the existing interconnection agreements on file with the state commissions.⁴ BellSouth appended its "standard" interconnection agreement to the negotiation request.⁵ In the standard interconnection agreement, BellSouth inserted language regarding a so-called "market"⁶ rate for unbundled local switching in metropolitan statistical areas ("MSAs") where it would not be required to provide switching as a section 251(c)(3) UNE.⁷ the "market" rate BellSouth offered was \$14.00 per month recurring for the port and \$90.00 non-recurring (first and additional).

³ See *id.* at 487.

⁴ See Letter to Jerry Watts, Vice President Regulatory Affairs, ITC^DeltaCom, Inc., from Michelle Culver, Manager-Interconnection Services Marketing, BellSouth (Apr. 12, 2002) (provided as Exhibit 1).

⁵ See Exhibit 1, which appends relevant pages of the proposed interconnection agreement.

⁶ The Orwellian term "market" rate is the term adopted by BellSouth. ITC^DeltaCom is unaware of any other wholesale provider of local switching in Tennessee (or anywhere else in the BellSouth region for that matter), and BellSouth failed to name a single wholesale provider in any of the state-level *Triennial Review Order* proceedings. Given the complete absence of any "market," ITC^DeltaCom views BellSouth's choice of label odd.

⁷ The MSAs at issue in BellSouth's territory are: Atlanta, GA; Miami, FL; Orlando, FL; Ft. Lauderdale, FL; Charlotte-Gastonia-Rock Hill, NC; Greensboro-Winston Salem-High Point, NC; Nashville, TN; and New Orleans, LA.

Because the Parties had arbitrated in the 1999-2000 timeframe, ITC^DeltaCom requested that the Parties use the existing interconnection agreements on file and approved by the state commissions as the basis for their negotiations rather than BellSouth's "standard" interconnection agreement. Throughout the remainder of 2002 and into 2003, the parties exchanged redlines of the existing interconnection agreements, including Attachment 2, which set forth BellSouth's proposed "market" rate. BellSouth consistently and repeatedly included the so-called "market" rate for local switching for the top MSAs in its proposed interconnection agreement to be filed with the state commissions. At no time during the negotiations did BellSouth remove the \$14.00 rate.

Although the parties were able to resolve numerous issues as a result of their negotiations, they remained deadlocked over the rates, terms, and conditions for local switching in the top MSAs within BellSouth's region. Accordingly, on February 7, 2003, ITC^DeltaCom filed a Petition for Arbitration with all nine BellSouth states.⁸ In answering ITC^DeltaCom's petition, BellSouth again proposed a local circuit switching rate of \$14.00 per port per month,⁹ and specifically requested that the TRA approve its proposed interconnection agreement language for the "market" rate.¹⁰

Furthermore, BellSouth never sought to remove Issue 26 – local switching – from the arbitration. On July 2, 2003, BellSouth filed with the TRA a Motion to Remove Issues from consideration. In particular, BellSouth sought to remove four issues (Issues 9, 6, 66, and 67) from the proceeding on the ground that they "are more appropriately addressed in other dockets or forums,...or are simply not

⁸ See Exhibit 2. ITC^DeltaCom later withdrew its arbitration petitions in Kentucky (ITC^DeltaCom had no local customers in Kentucky at the time), Mississippi and South Carolina. Local switching was not an issue in either Mississippi or South Carolina because neither state has a 50 top MSA.

⁹ The Arbitration Petition and the Answers are substantially the same for each of the nine states.

¹⁰ See BellSouth Response to ITC^DeltaCom Petition for Arbitration, TRA Docket No. 03-00119 (Mar. 4, 2003) (attached hereto as Exhibit 3).

appropriate for an arbitration under Section 252 of the Telecommunications Act of 1996).”¹¹ BellSouth did not seek to remove Issue 26(d) – determination of the market rate – at that time or at any subsequent point during the arbitration.¹² Having failed to resolve Issue 26, the parties filed testimony and the TRA held hearings on the following:

- Local Switching – Line Cap and Other Restrictions (Attachment 2 – Sections 9.1.3.2 and 9.1.2)
- a). Is the line cap on local switching in certain designated MSAs only for a particular customer at a particular location?
 - b). Should the Agreement include language that prevents BellSouth from imposing restrictions on DeltaCom’s use of local switching?
 - c). Is BellSouth required to provide local switching at market rates where BellSouth is not required to provide local switching as a UNE?
 - d). What should be the market rate?

Subsequently, on January 12, 2004, the TRA directed parties to submit Final Best Offers (“FBO”) for a “market rate.” A FBO requires each party to make an offer to resolve the disputed issues before the TRA renders a ruling. Throughout the hearing, and in its FBO, BellSouth continued to argue that its rate of \$14.00 per port per month was just and reasonable.¹³ The TRA adopted ITC^DeltaCom’s FBO on an interim basis pending resolution of a generic proceeding.

III. ARGUMENT

A. The Commission Does Not Have Jurisdiction to Hear BellSouth’s Petition

As demonstrated above, the TRA established the rate for local switching in the context of an arbitration between ITC^DeltaCom and BellSouth pursuant to section 252 of the Act. Under section 252(e)(b), the exclusive remedy for an entity aggrieved by an arbitration decision is to bring action in federal court:

¹¹ See BellSouth Telecommunications, Inc.’s Motion to Remove Issues from ITC^DeltaCom Communications, Inc.’s Petition for Arbitration, TRA Docket No. 03-00119 (July 2, 2003). A copy is attached hereto as Exhibit 4.

¹² Indeed, BellSouth did not seek to remove Issue 26 from any of the arbitration proceedings in any state.

¹³ At the hearing, BellSouth was unable and/or unwilling to produce any evidence as to how it arrived at that rate.

In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 and this section.¹⁴

Federal courts have reiterated that they have exclusive jurisdiction for challenges to state commission arbitration rulings.¹⁵

B. The TRA Has Authority And A Duty To Resolve Open Issues Raised In Negotiations And Arbitrated By The Parties

It is undisputed that BellSouth negotiated the rate for the delisted local switching network element with ITC^DeltaCom. This is evident based on the numerous iterations of Attachment 2 and the rate attachment to the agreement. BellSouth also requested and sought state commission approval of its language regarding a “market” rate, and its proposed “market” rate, (*i.e.*, particular, \$14.00 per month recurring for the port and the non-recurring charge of \$90.00 for the port) in the arbitration proceedings before the TRA and the other state commissions. In its Answer, Bellsouth requested that the TRA approve its language regarding the market rate. Accordingly, under *Coserv*, BellSouth is subject to the jurisdiction of the TRA and other state commissions. In *CoServ* the Court held:

¹⁴ 47 U.S.C. § 252(e)(6). On July 14, 2004, ITC^DeltaCom filed a letter with the Commission requesting that it dismiss BellSouth’s petition and attaching a copy of ITC^DeltaCom’s Complaint for Declaratory Judgment filed with the U.S. District Court for the Middle District of Tennessee. *See* Letter to Marlene H. Dortch, Secretary, Federal Communications Commission from Henry Walker, Boulton, Cummings, Conners & Berry, PLC, Counsel to ITC^DeltaCom (July 14, 2004). ITC^DeltaCom incorporates the letter and the arguments raised therein in this pleading.

¹⁵ *See, e.g., MCI Telecommunications Corp. v. Bell Atlantic-Pennsylvania*, 271 F.3d 491, 511 (3rd Cir. 2001) (holding that section 252(d)(6) “specifically provides for ‘actions’ in federal court to address ‘agreements’ and ‘statements’ approved by state utility commissions,” but also that “[f]ederal jurisdiction for the review of commission decisions or interconnection agreements is exclusive.” *See also GTE North v. Strand*, 209 F.3d 909 (6th Cir. 2000) (“Once a state commission rules on a proposed agreement, Section 252(e)(6), the FTA provision at issue in this case, authorizes any aggrieved party to ‘bring an action in an appropriate Federal district court to determine whether the agreement...meets the requirements of section 251.’”); *MCI Telecommunications Corp. v. Illinois Bell Telephone Company*, 222 F.3d 323, 337 (7th Cir. 2000) (“Subsection 252(e)(4) provides that ‘[n]o State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section.’ . . . This language indicates that Congress envisioned suits reviewing ‘actions’ by state commissions, as opposed to suits reviewing only the agreements themselves, and that Congress intended that such suits be brought exclusively in federal court.”).

Where competitive local exchange carrier (CLEC) and incumbent local exchange carrier (ILEC) have voluntarily included in negotiations issues other than those duties required of an ILEC by the Telecommunications Act, those issues are subject to compulsory arbitration; the jurisdiction of the state public utility commission (PUC), to arbitrate "any open issues," is not limited by the terms of the Act provisions setting forth the ILEC's duties but, instead, is limited by the actions of the parties in conducting voluntary negotiations. Communications Act of 1934, §§ 251(b, c), 252(b)(1), as amended, 47 U.S.C.A. §§ 251(b, c), 252(b)(1).¹⁶

In *Coserv*, the Court held that where the parties have voluntarily included in negotiations issues other than those duties required of an ILEC by Section 251(b) and (c), those issues are subject to compulsory arbitration under Section 252(b)(1).¹⁷ The jurisdiction of the state commission as arbitrator is not limited by the terms of Section 251(b) and (c); instead it is limited by the actions of the parties in conducting voluntary negotiations. It may arbitrate only issues that were the subject of the voluntary negotiations.

In the present case, BellSouth voluntarily addressed the issue of the "market" rate as part of the interconnection agreement negotiations, and, therefore, under *Coserv*, the TRA was obligated to resolve that issue. BellSouth requested negotiations pursuant to Sections 251 and 252, and BellSouth proposed language to be included in the interconnection agreement to be filed and approved by the state commission, including language regarding the provision of local switching in the top 50 MSAs where BellSouth is not required to provide local switching at TELRIC rates. Additionally, in its answers to the arbitration petitions, BellSouth provided its proposed interconnection agreement that included the so-called "market" rate.¹⁸

BellSouth did not seek referral of this issue to the Commission in February 2003 when ITC^DeltaCom filed its arbitration petition. BellSouth did not seek referral to the FCC of this issue when

¹⁶ *Coserv*, 350 F.3d at 487 (emphasis added).

¹⁷ *Id.*

¹⁸ Additionally, in testimony at hearing, BellSouth witness Blake agreed that BellSouth is proposing that the NCUC include in its order and approve an interconnection agreement between ITC^DeltaCom and BellSouth, a market rate for switching. See ITC^DeltaCom Communications, Inc., Petition for Arbitration with BellSouth Telecommunications, Inc., Docket No. P-500, Sub 18, Hearing Tr. Vol. 3, at 65-66 (Aug. 5, 2003).

the FCC released its *Triennial Review Order*. It is unjust and unreasonable that BellSouth which sought through negotiations under sections 251 and 252 with ITC^DeltaCom to include a “market” rate in the parties’ interconnection agreement, should be able to negotiate, arbitrate, and then when it does not get the answer it wants (*i.e.*, the approval of its monopoly \$14.00 rate), forum-shop to get a better answer.

Furthermore, as stated above, at no time did BellSouth ever attempt to remove the issue of the so-called market rate from either the negotiations or the arbitration. BellSouth did petition the TRA to remove issues that it deemed “not appropriate for an arbitration under Section 252”, but local switching was not one of those issues. It was not until the TRA rejected BellSouth’s \$14.00 rate that BellSouth filed this “Emergency Petition.”¹⁹

C. State Commissions Retain Jurisdiction Over Interconnection Agreements and Over Section 271 Elements

Each of the key network elements required by CLECs to compete are specifically enumerated in section 271, forming an independent obligation unrelated to the obligations imposed by section 251. Section 271 offerings must be implemented through interconnection agreements or Statement of Generally Available Terms and Conditions (“SGATs”) approved according to section 252. Section 252 provides that state commissions are responsible for arbitrating disputes, including those disputes concerning the offering of elements required under section 271. Indeed, in the *Triennial Review Order*, the FCC stated:

These additional requirements [the unbundling obligations in the competitive checklist] reflect Congress’ concern, repeatedly recognized by the Commission and courts, with balancing the BOCs’ entry into the long distance market with increased presence of competitors in the local market.... The protection of the interexchange market is reflected in the fact that section 271 primarily places in each BOC's hands the ability to determine if and when it will enter the long distance market. If the BOC is unwilling to open its local telecommunications markets to competition or

¹⁹ The TRA voted on the FBOs on June 21, 2004, however no written order has been issued.

apply for relief, the interexchange market remains protected because the BOC will not receive section 271 authorization.²⁰

In exchange for opening its *entire* network to competitors, the BOC is permitted to provide long distance services to its local customers (and others). After obtaining section 271 authority, BOCs must continue to provide the switching, loops, transport, and signaling, even if these network elements are delisted. Section 271 states:

(B) COMPETITIVE CHECKLIST - Access or interconnection provided or generally offered by a Bell operating company to other telecommunications carriers meets the requirements of this subparagraph if such access and interconnection includes each of the following: . . .

(iv) Local loop transmission from the central office to the customer's premises unbundled from local switching or other services.

(v) Local transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services.

(vi) Local switching unbundled from transport, local loop transmission, or other services.

(x) Nondiscriminatory access to databases and associated signaling necessary for call routing and completion.

Each section 271 network element must be offered through interconnection agreements or SGATs that are subject to the section 252 review process. To begin, section 271(c)(2)(A) links a BOC's obligations under the competitive checklist to its providing that access through an interconnection agreement (or SGAT):

(A) AGREEMENT REQUIRED - A Bell operating company meets the requirements of this paragraph if, within the State for which the authorization is sought-- (i)(I) such company is providing access and interconnection pursuant to one or more agreements described in paragraph (1)(A) [Interconnection Agreement], or (II) such company is generally offering access and interconnection pursuant to a statement described in paragraph (1)(B) [an SGAT], and (ii) such access and interconnection meets the requirements of subparagraph (B) of this paragraph [the competitive checklist].

²⁰ *In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, FCC 03-36, ¶ 655 (Aug. 21, 2003) ("Triennial Review Order").

As the above language makes clear, the specific interconnection obligations of section 271's competitive checklist (item ii above) must be provided pursuant to the "agreements" described in section 271(c)(1)(A) or the SGAT's described in section 271(c)(1)(B). By directly referencing section 271(c)(1)(A) and (B), the Act explicitly ties compliance with the competitive checklist to the review process described in section 252.

As section 271(c)(1) states:

(1) AGREEMENT OR STATEMENT- A Bell operating company meets the requirements of this paragraph if it meets the requirements of subparagraph (A) or subparagraph (B) of this paragraph for each State for which the authorization is sought.

(A) PRESENCE OF A FACILITIES-BASED COMPETITOR.- A Bell operating company meets the requirements of this subparagraph if it has entered into one or more binding agreements that have been approved under section 252 specifying the terms and conditions under which the Bell operating company is providing access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service (as defined in section 3(47)(A), but excluding exchange access) to residential and business subscribers.

The Act could not be more explicit: section 271 network elements must be offered pursuant to the same review process as other (*i.e.*, section 251) network elements. One of the central goals of the Act is to prevent discrimination, and the principal mechanisms to detect and prevent discrimination are the state-review provisions of section 252. The FCC already has addressed BOC attempts to evade the disclosure, review and opt-in protections of section 252. Specifically, in the *Qwest Declaratory Ruling*, the FCC made clear that any agreement addressing *ongoing* obligations pertaining to unbundled network elements – and the access and unbundling obligations of section 271 fall squarely within that definition – must be filed in interconnection agreements subject to 252 and, to the extent any question remains regarding those obligations, that the state commissions are to decide the issue.²¹ The FCC rejected Qwest's request,

²¹ See *Qwest Communications International Inc.*, 17 FCC Rcd 19,337 (2002).

determining section 252 creates a broad obligation to file agreements, subject to specific narrow exceptions that do not exempt section 271 elements.

D. Competition is Not Impaired by State Rate Review


BellSouth is incorrect that the TRA's acceptance of ITC^DeltaCom's FBO, "eliminates any hope for commercial negotiations."²² The reverse is true. It is apparent through the scores of CLECs that have attempted to negotiate with BellSouth that commercial negotiations of a local switching rate for the Top 50 MSAs are not a practical reality. As demonstrated above, throughout the course of the parties' negotiations and the arbitration, BellSouth flatly refused to move off of its \$14.00 per port per month rate for local switching in the Top 50 MSAs. BellSouth also failed to provide any supporting documentation for this rate. Furthermore, even after the TRA specifically requested that BellSouth provide a Final and Best Offer, BellSouth steadfastly clung to that same \$14.00 rate. BellSouth's own actions have illustrated that true commercial negotiations are not feasible unless both parties negotiate in good faith.

IV. CONCLUSION

For the foregoing reasons, ITC^DeltaCom respectfully requests that the Commission deny BellSouth's petition.

Respectfully submitted,

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July 30, 2004

²² See BellSouth Petition at note 2.

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of July, 2004 I served copies of the foregoing
Opposition of ITC^DeltaCom Communications, Inc. on the following by e-mail and U.S. mail,
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